Virginia Law Register

VOL. 8, N. S.] AUGUST, 1922. [No. 4

PRACTICE BEFORE THE SUPREME COURT*

It is with unaffected diffidence that I attempt to address so great an audience of New York lawyers,—because you have such long memories.

Not long since I heard a member of the New York bar, for the purpose of illustrating how difficult it is for an outsider, especially if he comes from west of the Hudson River, to understand a New York audience, tell this story.

He said: "Many years ago, a Justice of the Supreme Court of the United States came over from Washington to speak at a lawyers' dinner," which he described as not greatly different from this one, and then he continued: "The first half hour was well enough. At the end of the second half hour some of his hearers were dismayed and many were asleep, but at the end of the second hour, Well," he said, turning smilingly to me, "saving your presence, Mr. Justice, it was just a little heavy and a little dull." That judge has been in his grave over thirty years. Do you wonder that I should shrink a little from the thought of having some one of the young men here present, when I have been dead a third of a century, rise in his place, and for the purpose of pointing a moral or adorning a tale, recall the shortcomings of what I shall say tonight. Really, it is a terrifying prospect. But fortune favors the bold, and I shall go forward, trusting to your charitable judgments.

Of course, if I choose to do so, I could talk to you very learnedly of what the law is and of what it ought to be. I could tell you just what you should do in order to live happily, practice law successfully and die confidently—any Supreme judge should be able to do that. But profundity seems to have been the fatal defect of the speech of my predecessor, and I have decided that

*An address delivered by Hon. John H. Clarke, Associate Justice of the Supreme Court of the United States at the Annual Dinner of New York University Law Alumni, Feb. 4, 1922.

a New York dinner audience, even though I may not fully understand its wishes, would be more entertained, if not instructed, by some of the observations I have made and some of the reflections which have come to me during the five and a half years of my service as a member of the Supreme Court of the United States than by any discussion I might offer of the problems of the law that lie "behind the beyond."

The first impression made upon me by my service as a member of the Supreme Court was that of surprise at the great number of cases finding their way into that court which are of entirely negligible importance, whether considered from the point of view of the principles of law or of the property involved in them. That impression has been intensified as time has passed, for their number constantly increases.

There seems to be a type of lawyer in every part of our country who, once he is retained in a cause, no matter how trivial, sets to work with all the ingenuity he possesses to import into the record a federal question which he thinks may enable him to carry it to the Supreme Court of the United States if he should prove unfortunate in the courts below.

I have often wondered what the motive can be underlying such a practice. It must be one operating very widely, for such cases come from every part of the land—from Maine to Texas.

I have heard it suggested that the disposition springs from a desire for the local prestige which it is thought may be gained from conducting litigation in the highest court of the land. But surely there is little credit of any character to be derived from such results as are published in the concluding pages of each volume of the Supreme Court Reports, where so many such cases are recorded as dismissed for want of jurisdiction, or because the question presented is frivolous, or has been so often decided as to be no longer open to discussion.

It has been said also that the practice is often simply an anchor cast to windward to postpone, in desperate cases, the day of ultimate settlement because of the two years required to see the end of such a proceeding in the Supreme Court. But surely such a motive cannot be general enough among lawyers to account for a practice prevailing so widely throughout the country.

Reflection convinces me, ladies and gentlemen of the Bench

and Bar, that this disposition really springs from no such unworthy motive as either one of these, but that it finds its origin and end in the laudable—the highly laudable—ambition of many American lawyers to make a personal contribution to that great and swelling volume of refinement in thought and speech which is loosely designated "Constitutional Jurisprudence." There are many lawyers who seem to think that any judgment rendered against any client of theirs is necessarily a depriving him of his property "without due process of law" and that it also denies to him "the equal protection of the laws"—all in violation of that elusive and much overworked Fourteenth Amendment to the Constitution of the United States.

Unless he sits on the Bench of the Supreme court and hears, day after day, the astonishing discussions and distinctions there presented, no man can fully realize the extent to which ingenuity and refinement of constitutional discussion are rapidly converting the members of our profession in this country into a group of casuists rivaling the Middle Age schoolmen in subtlety of distinction and futility of argument.

As early as Gibbons *v.* Ogden, decided in 1824, Chief Justice Marshall expressed the fear that powerful and ingenious minds by a course of refinement and metaphysical reasoning might so succeed in contracting the powers of the general government as to leave the constitution of our country "a magnificent structure, indeed, to look at, but totally unfit for use." If he were to revisit today the scene of his great constructive labors he would find ten lawyers to one of his time, seeking with the same refinement of argument and subtlety of metaphysical reasoning to expand the powers of the federal constitution for the purpose of avoiding the payment of taxes or the punishment of crimes imposed by state and national laws or in an effort to erect barriers against every change proposed in the name of progress. Such refinement must be met in our time as it was in Marshall's time, by holding fast to safe and fundamental principles and by interpreting them in that spirit of sound practical wisdom and common sense with which the founders launched the great experiment.

The Fourteenth Amendment has, of course, been the source of most of this trivial litigation, but with expanding federal activities the Fifth Amendment is becoming increasingly fertile.

eenth Amendment may ultimately do to us in this respect. Yes, I am convinced that it is the widespread desire to personally participate in the evolution of constitutional jurisprudence that inspires a large part of this futile effort.

But whatever doubts there may be as to the motive impelling to such practice, there cannot be any doubt at all that it results in a great waste of the time of the Supreme Court judges and in imposing upon them much unnecessary and fruitless labor—and this is my reason for speaking of it tonight. Much time is necessarily consumed in the oral argument of such cases for, while many of them can be disposed of out of hand, there are many others which must be examined with the utmost care to make sure that there is not lurking somewhere in the record a question of real public importance, which has been wrongly decided by the court below.

Of course, ladies and gentlemen, it is not for me to eulogize the Supreme Court of the United States. But, for better or for worse, our federal judicial system has become what Washington more nearly than any of his contemporaries saw and said that it would become: "The chief pillar upon which our national government must rest—the keystone of our political fabric." The Supreme Court, the the head of that system, has recently been competently characterized as "the living voice of the Constitution"—of that Constitution which is certainly the most important single document of modern times, and which was so impressively declared by Marshall to be destined to "live and take effect in all succeeding ages." Not alone because of the unprecedented power of the Supreme Court under the Constitution, in appropriate cases, to declare acts of Congress and of State Legislatures unconstitutional and void, but also because of its jurisdiction to summon to its bar for judgment in many cases, not only the States of our Union, but also the Government of the United States itself, it has come to pass that there are constantly pending before that court many cases the decision of which must affect—intimately and profoundly affect—the lives and welfare of many millions of men and women. A single illustration will serve my purpose. The authority that controls arteries of rail transportation controls to a great extent and in a very real manner the business, the lives and the happiness of the people who live in the territory dependent upon such lines, and if in the Northern Se-

curities case, decided in 1903, it had been held, as it was contended by very able counsel that it must be held, that it was not constitutionally competent for Congress to prohibit the combination through a single holding company of two great parallel and competing lines of railway extending from Duluth to the Pacific Ocean, and thereby to prevent the great populations living upon those lines from falling into the power of a small group of men, no man can overstate what the effect would have been upon our country. If the case had been decided the other way and men had been left free, through corporate organization, to combine the other great transportation lines of the country and other great departments of business, it seems very clear that our free institutions would long ere this have been subjected to a test of strength and endurance to which every patriot must hope they may never be exposed.

This one case—there have been many equally important in our history and there will be many more in the future—illustrates the fact that the scope of the jurisdiction of the Supreme Court has become so fateful that the effects of many of its decisions upon the welfare of our country are as great as are the results of decisive battles in a great war.

It must be obvious, I think, that no judge with that sense of the responsibility and duty to his country which every Supreme Court judge may be assumed to have would participate in the deciding of such great cases without making the most painstaking and exhaustive examination of them of which he is capable, and that men upon whom such responsible duties rest should not be harassed and annoyed by the investigation of trifling and unimportant cases. The time and strength should be reserved and conserved for use in the investigation and decision of those questions of public interest and importance which are constantly coming before them.

Thus I come to the purpose of this discussion, which is to say that I think it is the duty of every American lawyer, not to the Supreme Court, but to his country, before he decides to pursue a cause into the highest court of the land to ask himself candidly, as a citizen rather than as an advocate, whether the case is of sufficient general importance to justify his calling it to the attention of, and of his imposing the labor of an examination of it upon, a court primarily organized to deal with matters of the

greatest public concern, especially now, when all the world knows that it is no longer humanly possible for that court to keep abreast of its docket in this rapidly growing country of ours, with its constantly expanding commercial and political activities. While Congress from time to time has restricted the character of cases which may be taken to the Supreme Court, it yet remains certainly true that for keeping the volume of the business of that court within the capacity of any group of men to adequately dispose of it, the most dependable resource is to be found in the law offices of the country—in the co-operation of the lawyers of the land, to refuse to carry cases involving unimportant questions to the court upon which our system of government imposes so many duties fateful,—in the last degree fateful,—to our republic.

But since some of you may think that this appeal which I am making is too altruistic, too sublimated, for this rough, rude world of practical affairs, permit me to translate it into terms of sordid selfishness.

During the five years last past 1,648 cases were argued in the Supreme Court. Of these just about 400, or one-quarter, were disposed of by per curiam decisions upon authorities which were cited because the court was without jurisdiction or because the questions presented were deemed so unsubstantial as to be unworthy of serious attention, or because the cases were so clearly ruled by prior decisions that the questions involved could not longer be considered open for discussion.

In the twenty-five per cent of all the cases heard which were thus summarily disposed of, the cases are included which I am urging should never have been taken to the Supreme Court at all. And what must such a result be to the lawyer responsible for carrying them there? It would be difficult to imagine a more unpleasant and humiliating experience than that of meeting a client after his case had been disposed of in this summary way, unless it should be that of encountering the more or less concealed look of triumph in the next greeting of one's lawyer adversary. Surely there is nothing but disappointment, chagrin and loss of professional prestige for those who pursue an unworthy or trivial case into the Supreme Court of the United States, and the wonder is that so many men attempt it;—perhaps it is sufficient explanation to say that the same man never does it twice. One such experience is enough.

Thus private interest and public duty unite to impress upon our profession the obligation to refuse to carry any but cases of real general importance to the Supreme Court of the United States, to the end that its docket may not become so swollen as to render it impossible for any group of judges, however able or devoted, to find time and strength for an adequate consideration of the cases of great public importance, which are constantly pressing upon its attention.

Another impression of surprise—of deep and increasing surprise—was made upon me by the general failure of lawyers presenting cases to the Supreme Court to introduce their arguments with short and comprehensive statements of the facts of their cases, what the disposition of them was below, and the principles of law relied upon for affirmance or reversal.

John Marshall is so distinctly the first figure in our legal history that the characteristics of his mind and methods have been studied and written about from every possible point of view, but emphasis has been so usually centered upon his extraordinary power of reasoning and upon his vision as a lawyer-statesman that what I think an almost equally important power of his has been, in a measure, neglected or overlooked—I mean his capacity for making a clear statement of the facts of a case. I never reread any of the great opinions by Marshall without being impressed anew by the manner in which he causes not only the controversy involved, but also what the decision of it should be, to emerge naturally and inevitably from the clear epitome which he makes of the case. It is apparent always that this great judge considered such statement of quite as much importance as the reasoning based upon it, and that he prepared it with the utmost care.

It is a familiar proverb of our profession, handed down by each generation of lawyers to the next,—but, alas, little heeded in practice—that "the case that is well stated is more than half argued," but Marshall sometimes went even farther than this, as, for instance, when he said of David B. Ogden, a distinguished New York lawyer of his time, "When Ogden stated his case it was already (not half, but fully) argued."

I have thus invoked the great name of Marshall for the purpose of adding emphasis to the warning which I bring from my

service of five and a half years on the Supreme Bench, against what is plainly a growing disposition on the part of members of the bar to neglect to give that attention to the introductory statement of a case which its importance deserves, in order to hurry on to the citation and discussion of authorities.

Whether this disposition springs from an underestimate of the importance of the statement of the facts or from confidence that the mastery of a case will instinctively result in a clear statement of it, or from sheer neglect, I do not know, but it is certainly true that very few lawyers, young or old, experienced or inexperienced, open their arguments as they should open them, with a clear but condensed statement of the essential facts, which will enable an attentive judge to make application of the principles of law upon which reliance is placed for reversal or affirmance of the judgment under review.

It is not unreasonable to assume that the judges of any court of review will know something of the law applicable to any case that may be presented to them, but it is very certain that they will not know anything of the facts of a particular case to which it is desired the law shall be applied, until informed by the statement of counsel. Therefore the facts, always the facts, should be stated before entering upon argument of the law.

If a lawyer who is no longer young may be permitted to bring to you, from his long experience, a message of counsel on this important subject, it is this: Open every argument with a short, clear and candid statement of the essential facts of the case, and of the result in the court below, but without comment of any character. Follow this with a brief statement of the principles of law upon which reliance is placed for reversal or affirmance, but without argument of them, and conclude with a statement of the result which it is thought should follow. Such epitomized statement will, of course, be followed by a detailed statement and argument and citation of authorities, but without such an introduction it is often quite impossible even for the most attentive and able judge to appreciate the incidence and value of either discussion or authority. Incidentally, I may say that such a statement would have saved many a lawyer from these questions from the Bench which have sometimes proved so disconcerting to counsel and often disastrous to an otherwise sufficient argument. If I were to return to the bar tomorrow it would be with

my estimate of the importance of carefully preparing the introductory statement of each case greatly magnified by my service on the Supreme Court of the United States. Its importance cannot possibly be overestimated.

My service as a member of the Supreme Court brought me a third surprise in the length of the arguments often filed in that court and most inappropriately styled "briefs."

Ladies and gentlemen, a brief is authoritatively defined in the rules of the Supreme Court of the United States to be a concise abstract or statement of a case, presenting succinctly the questions involved and the manner in which they are raised, together with a specification of the errors relied upon and a brief argument, with a clear statement of the points of law or fact to be discussed, and a reference to the authorities relied upon in support of each point.

No doubt a rule substantially similar to this has been promulgated by almost every reviewing court of our country, but it is very certain that no provision of law is more uniformly violated than is this very important rule of practice.

In a recent case in the Supreme Court of the United States the briefs for the plaintiff in error contained 384 pages of the customary size, and those for the defendant in error contained 1,064 pages. In another case the briefs for the plaintiff in error contained 1,373 pages and those for the defendant in error, 992 pages. And in a recent simple, personal injury case the brief for the plaintiff in error contained 158 pages and the defendant in error, not to be outdone, made his brief 162 pages in length. As if in apology for such extension of briefs and in order that they may not seem as voluminous as they really are, a practice has of late been observed of printing briefs in two volumes. One volume is usually entitled "Brief on the Facts" and the other "Brief on the Law." In some cases also a separate third volume appears, entitled "Topical Index to Briefs." This last, I am bound to say, if such briefs are to be tolerated at all, is an important and valuable addition. But the climax to this briefing mania was recently reached when a lawyer, not engaged in the case, gravely asked leave of the Supreme Court to file a brief of 424 pages— amicus curiae as a friend (!) of the court.

The first two cases referred to were unusually complicated and the records were unusually extensive, but, nevertheless, they

serve to illustrate a disposition widely prevalent in our profession to compile treatises, loosely thrown together, instead of writing what may properly be called briefs. And all this is done, gentlemen, by a Bar which not very long ago memorialized all the appellate courts of the country, save one, to write fewer and shorter opinions, to remember that brevity is a "cardinal virtue" and that multiplied citations and quotations should be avoided in opinions as if they were a disease.

I have often wondered what the cause of this growing disposition to expand briefs into volumes really is. It cannot be that lawyers fear that a short brief may be accepted as implying that the case in which it is filed is unimportant, neither can it be that they fear that a short brief may be interpreted by the court as indicating lack of industry or confidence in the lawyer who files it. Upon full reflection I am persuaded that the blame for the practice must be laid, where the blame for many other shortcomings in law offices is laid, upon secretaries or assistants, or upon that catch-all of blame, the anonymous office stenographer. The truth is that it is so much easier to dictate than it is to write, to expand than to condense, to quote than to create that the boon which the efficient stenographer or the bright young man in the office is to the busy lawyer is fast becoming literally a bane to reviewing courts and a serious threat to the sound development of lawyers and of the law. There can be no doubt whatever that many a meritorious case has been lost in an over-expanded statement of the evidence or in the wilderness of inappropriate citation and quotation in which it has been submerged beyond the hope of resurrection in a treatise styled a "brief."

If there is one characteristic more than another that marks the capable lawyer it certainly is the power to see, and seize upon, and confine himself in argument to, the one or at most the few vital points upon which the decision of every case must really depend; and that this extensive brief making is usually unnecessary is often proved by the oral argument when, with the sure eye of informed experience, the case is stripped of much the greater part of the unimportant matter contained in the brief, and is limited to the few essentials of fact and of law upon which a decision of it must ultimately turn.

Since I have spoken of the beginning of the argument of a case

courts of which I have any knowledge the conclusion is next in importance—the appreciation of the fact that profitable discussion is exhausted and that it is time to stop—whether in written or oral argument.

But I think I see coming over the irreverent faces of some of the younger men before me a look which I interpret as saying that if the elderly justice does not soon make application of the counsels to brevity which he is offering to us, his speech, like that of his predecessor, will be remembered longest for its length. The warning is deserved and is accepted with that formula, so often used at the bar as an introduction to the last half-hour of argument, "One word and I have done."—It shall be a word of different character and in a different tone.

Ladies and gentlemen, we are living in a new world, a world so new that our past experience can be of little service, save to give us warning.

The resort to applied science for agencies for the destruction of life and property in the late war warns us that unless our civilization devises some means to make an end of war, war will make an end of our civilization.

The fate of Russia warns us that our existing social order, stable though it seems, may not long endure, even when buttressed by great armies, unless the masses of the people, on whom at last all governments rest, are given a fair share of that comfort and safety which it should be the first purpose of every government to provide for those who live under it.

The fate of Germany warns us that no government is strong enough to live in this new world without the friendship of other nations.

If we look about us, in foreign affairs we see the statesmen at Washington and London, at Paris and Rome and Tokio, searching as never before for some basis for the reorganization of a world that has fallen into international anarchy. Whether such reorganization shall be through a World Court, such as is in process of formation at The Hague, or through an association or alliance of some nations, or through a league of nations, to promote the peace of the world, the part which the legal profession must take in the readjustment must of necessity be very great.

If we consider home affairs we find ourselves, under the Nineteenth Amendment, at the beginning of an experiment of con-

ducting representative government with an electorate very much larger than has ever successfully governed itself in the past under that form of political organization. So great an electorate must require—of necessity require—such large expenditure of money, simply to inform voters of the merits of candidates and of what the issues are, that there will necessarily be brought into conspicuous operation the oldest and worst foe of free government —unless some new method of informing citizens can be devised. But the structure is safest that has the broadest base.

The Eighteenth Amendment required millions of men and women to abruptly give up habits and customs of life which they thought not immoral or wrong, but which, on the contrary, they believed to be necessary to their reasonable comfort and happiness, and thereby, as we all now see, respect, not only for that law, but for all law, has been put to an unprecedented and demoralizing strain in our country, the end of which it is difficult to see.

That we have millions of men and women idle and in want, and agriculture in greater distress than ever before, in this the richest country in the world, presents a problem in domestic reorganization and readjustment of the greatest public concern.

There are many other pressing problems, but these are sufficient to show that the part which must fall to law and lawyers in the reorganization of our domestic life will be as great and important as that involved in the readjustment of the international world.

Ladies and gentlemen, there can be no doubt that to lawyers in mid-career, but especially to the younger members of our profession, this new world is bringing opportunities for pioneer and constructive thinking and action and service equal to, if not greater than, those of which the lawyer-framers of our Constitution made so much for us and for all men. As one of a generation that must soon yield its place to the next, I envy but congratulate you, and, judging of the American Bar by what I have seen of its members coming from the four corners of the country during the past five years, personally, I shall join in passing on the great trust with every confidence that the patriotism and devotion, the learning and character of that Bar will capably meet every requirement that the approaching domestic and world crisis may cast upon it.